83-852

Office - Supreme Court, U.S.
FILED
NOV 21 1983
ALEXANDER L. STEVAS,
CLERK

No._____

In The
Supreme Court of the United States
October Term, 1983

ELDON E. BELL,

Petitioner,

vs.

CHESTER SELLEVOLD, ALVIN BLOCK, ARDIS ABBOTT, ORVILLE HEIN, AND CHARLES HESLA, BOTH INDIVIDUALLY AND AS THE BOARD OF COUNTY COMMISSIONERS OF DAY COUNTY; AND DAY COUNTY, AN ORGANIZED COUNTY OF THE STATE OF SOUTH DAKOTA,

Respondents,

and

IN RE: DAY COUNTY, SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID A. GERDES
May, Adam, Gerdes & Thompson
503 South Pierre Street
P. O. Box 160
Pierre, South Dakota 57501
(605) 224-8803

THOMAS E. KLINKEL
Richardson, Groseclose, Kornmann, Wyly, Wise & Klinkel
One Court Street
P. O. Box 1030
Aberdeen, South Dakota 57401
(605) 225-6311

and

Attorneys for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

1. In an action under 42 U S. C. 1983 alleging denial of procedural due process affecting property and liberty interests, where after hearing the trial court has temporarily enjoined the defendant county board from removing plaintiff from a county-owned clinic pending trial, may the circuit court in an intermediate appeal testing the propriety of the temporary injunction weigh the evidence and conclude as a matter of law that plaintiff was deprived of neither liberty nor property, in effect, permitting defendants to appeal contrary to settled law from a denial of summary judgment?

2. May the circuit court justify an evidentiary and quasi-legal determination made by the defendant board based solely upon rumor and hearsay without notice and hearing to plaintiff, on the basis that the defendant board was merely deciding to go to state court to assert whatever rights it might have, thus concluding as a matter of law that plaintiff's due process rights had not been violated?

3. Was the circuit court correct in concluding that plaintiff was deprived of neither liberty nor property, notwithstanding substantial, credible evidence of both accepted by the trial court and justified by unambiguous state law?

4. Did the circuit court err in holding as a matter of law that plaintiff's equal protection rights had not been violated, notwithstanding the trial court's contrary decision based on proof that the defendants' actions had no

rational basis and were actuated by personal animosity toward plaintiff?

5. Did the circuit court err in holding as a matter of law that plaintiff's substantive due process rights had not been violated, notwithstanding the trial court's contrary decision where the pleadings and evidence showed that the defendant Board acted arbitrarily and without just or adequate reason?

6. Where the pleadings seeking injunctive relief and the proof showed a violation of state law by the defendant board in seeking to dispossess plaintiff from occupancy of the county-owned clinic, was the trial court correct in asserting that pendent judisdiction would lie over a state court unlawful detainer action commenced by defendants?

PARTIES TO THE PROCEEDING

All parties to this proceeding are set forth in the caption. Eldon E. Bell is petitioner in In Re: Day County, South Dakota.

TABLE OF CONTENTS

Pages

Questions Presented For Review i

Parties to the Proceeding ii

Table of Authorities iv

Opinions Below 1

Grounds For Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons For Allowance Of Writ 8

Argument and Authorities 8

Conclusion 20

Appendix:

1. Trial Court Order of January 24, 1983 ..... A-1
2. Circuit Court Decision A-3
3. Complaint A-22
4. Recruiting Letter of May 8, 1969 ..... A-33
5. County Commission Proceedings of July 17, 1981 ..... A-35
6. County Commission Proceedings of September 19, 1982 ..... A-37
7. Notice of Lease Termination of September 20, 1982 ..... A-38
8. Newspaper Report of Lease Termination of September 22, 1982 ..... A-38
9. "Reasons" Letter of November 23, 1982 ..... A-40

TABLE OF AUTHORITIES

Pages

Application of Union Carbide Corp., 308 N. W. 2d 752 (S. D., 1981) ——— 14

Bell v. Sellevold, 713 F. 2d 1396 (8th Cir., 1983) ——— 2

Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) ——— 13, 16

Caldwell v. Pierson, 37 S. D. 546, 159 N. W. 124 (1916) ——— 14

Chavez v. City of Santa Fe Housing Authority, 606 F. 2d 282 (10th Cir., 1979) ——— 15

Conley v. Board of Trustees, Grenada County Hosp., 707 F. 2d 175 (5th Cir., 1983) ——— 15

Escalera v. New York City Housing Authority, 425 F. 2d 853 (2nd Cir., 1970) ——— 15

Foster v. Mobile County Hospital Board, 398 F. 2d 227 (4th Cir., 1968) ——— 18, 19

John Hancock Mut. Life Ins. Co. v. Kraft, 200 F. 2d 952 (2nd Cir., 1953) ——— 12

Kay v. North Lincoln Hosp. Dist., 555 F. Supp. 527 (D. C., Ore., 1982) ——— 15

Klinge v. Lutheran Charities Association, 523 F. 2d 56 (8th Cir., 1975) ——— 14, 19

Mansell v. Saunders, 372 F. 2d 573 (5th Cir., 1967) ——— 18

Marrero v. City of Hialeah, 625 F. 2d 499 (5th Cir., 1980) ——— 16

Northeast Georgia Radiologist Assoc. v. Tidwell, 670 F. 2d 507 (5th Cir., 1982) ——— 15

Nyberg v. City of Virginia, 495 F. 2d 1342 (8th Cir., 1974) ——— 15

Perry v. Sindermann, 408 U. S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) ——— 13

TABLE OF AUTHORITIES—Continued

	Pages
St. John's Hosp. M.S. v. St. John's Reg. M.C., 245 N. W. 2d 472 (S. D., 1976)	10
Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1943)	18
United Mine Workers of America v. Gibbs, 383 U. S. 715, 16 L. Ed. 218, 86 S. Ct. 1130 (1966)	19
Upper Mississippi Towing Corp. v. West, 338 F. 2d 823 (8th Cir., 1964)	12
Wisconsin v. Constantineau, 400 U. S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971)	16

STATUTES

28 *U.S.C.* 1254(1)	2
28 *U.S.C.* 1292(b)	12
42 *U.S.C.* 1983	2, 9
1969 S. D. Session Laws, Ch. 108	4
SDCL 21-8-14	19
SDCL 21-16-2	7
SDCL 34-8-1	9
SDCL 34-8-8.1	10, 18
SDCL 43-8-10	13

MISCELLANEOUS

Annotation, 15 A. L. R. 3d 899, §§ 5 & 6	12
United States Constitution, Amendment XIV, Section 1	2, 13

No._____

In The

Supreme Court of the United States

October Term, 1983

ELDON E. BELL,

Petitioner,

vs.

CHESTER SELLEVOLD, ALVIN BLOCK, ARDIS ABBOTT, ORVILLE HEIN, AND CHARLES HESLA, BOTH INDIVIDUALLY AND AS THE BOARD OF COUNTY COMMISSIONERS OF DAY COUNTY; AND DAY COUNTY, AN ORGANIZED COUNTY OF THE STATE OF SOUTH DAKOTA,

Respondents,

and

IN RE: DAY COUNTY, SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

At the conclusion of the hearing on plaintiff's motion for a preliminary injunction, held on January 3 and 24, 1983, the trial court ruled from the bench and orally announced its findings. This ruling appears at pages 255 through 267 of the transcript, which is a part of the settled record herein. The court's order granting plaintiff's

motion for a temporary injunction, denying defendant's motion to dismiss and ordering the case for trial is set forth in the appendix. The circuit court decision is *Bell v. Sellevold,* 713 F. 2d 1396 (8th Cir., 1983) which is set forth in the appendix.

GROUNDS FOR JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered August 15, 1983. A timely petition for rehearing, or rehearing *en banc,* was filed and later denied on September 15, 1983. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In pertinent part, the United States Constitution, Amendment XIV, Section 1 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In pertinent part, 42 *U.S.C.* § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE[1]

This case arises in Webster, South Dakota, which is the county seat of Day County and is the only town in the county with a medical clinic or hospital.[2] Webster has a population of 2,414, while Day County is populated by 8,106 persons.[3]

In 1969, as a response to a shortage of physicians which had begun to plague rural communities in South Dakota,[4] Day County purchased with county hospital funds a medical clinic building which had been previously constructed by the Webster Development Corporation.[5] The

---

[1]The parties will be identified as denominated in the lower court, or by name. References to the Appendix to this brief are by the letter A, followed by the page to which reference is made. References to the record on appeal will be as follows: trial transcript by the letter T followed by the page number to which reference is made, e. g. (T-1); Clerk's record by the letter R followed by the page number to which reference is made e. g. (R-1); Bowles deposition by the name Bowles followed by the page to which reference is made, e. g. (Bowles-1); and exhibits as they were marked and received into evidence. In the trial transcript a page numbering error occurs—there are two series of pages numbered 69 to 78, inclusive. For clarity, the numbers on the pages in the second series will be followed by the letter "a" so a reference to one of these pages would appear as (T-69a).

[2]T-8, 76a, 77a, 116.

[3]Source, 1980 Federal Census.

[4]T-64, 159, Bowles-7.

[5]Bowles-10-14.

purchase occurred immediately after enabling legislation had been passed by the state legislature, defining a clinic as a part of a county hospital.[6] It was part of an overall program to recruit and retain physicians by Webster and Day County, where quality medical care had been enjoyed for a number of years.[7]

The clinic was intended to attract physicians to Webster, where they could practice medicine for a nominal capital investment and under circumstances less trying than those normally found in rural communities, such as long hours and constant on-call status.[8] The inducement also included the prospect of practicing in a modern, equipped medical clinic owned and maintained by the county, at nominal rent and for as long as the physician supported the hospital with admissions and call, and maintained his license in good standing.[9] Leaving a responsible and rewarding career as an Air Force physician, Dr. Eldon Bell decided to relocate in Webster in October, 1969, relying on the recruiting representations which were made to him.[10]

In September of 1982 four physicians occupied the clinic, Dr. Lloyd Vogelgesang, Dr. Frank Sainburg, Dr. Lawrence Nelson and Dr. Bell. At that time, because of some dissatisfaction with Dr. Vogelgesang's lack

---

[6]Bowles-13; 1969 *S. D. Session Laws*, Ch. 108.

[7]Bowles-6, 7, 13, 14, T-66.

[8]Bowles-12, 21-24, T-71, 126.

[9]Bowles-21, T-7, 8, 67, 111, 112, 162, 164, Exhibit 11, A-33.

[10]Bowles-20, 61, 62, T-69, 70.

of support for the hospital,[11] the remaining physicians decided to form their own business arrangement among themselves on the clinic premises without affecting occupancy of the clinic.[12] This decision was communicated to the clinic employees on September 17, when they were asked to decide for whom they would work, the partnership or Dr. Vogelgesang.[13]

On Sunday, September 19, 1982, acting solely upon hearsay and rumor and without consulting any of the clinic occupants, the defendants voted to dispossess Drs. Vogelgesang, Nelson and Bell from the clinic.[14] Drs. Vogelgesang and Nelson, but not Dr. Bell, were subsequently reinstated. Without advising Dr. Bell of the charges against him or the persons making them, without consulting Dr. Bell or any other physician occupying the clinic, and without notice or hearing to Dr. Bell or any other physician, the defendants concluded that Dr. Bell should be removed from the clinic because he was the cause of "continuing turmoil" in the clinic making it diffi-

---

[11]Dr. Vogelgesang had resigned from the medical staff of the hospital effective January 1, 1981, which placed a tremendous burden upon Drs. Bell and Nelson. T-75, 76, 114. Notwithstanding a resolution of the county commission that all physicians resident in the clinic be members of the hospital medical staff, Dr. Vogelgesang never complied with the resolution. T-215, Exhibit 7, A-36. After Dr. Sainburg was recruited in June of 1982, Dr. Vogelgesang reneged on a promise to resume his position on the medical staff and refer surgical patients to Dr. Sainburg. T-8, 15, 121, 122. Although Dr. Vogelgesang occupied the clinic, he did not admit patients to the hospital and did not take his turn at being on call for the hospital. Bowles 22, T-13, 39-42, 69a, 78, 104-106, 114.

[12]T-74.

[13]T-14, 115, 196.

[14]T-191, 201, 206.

cult to recruit additional physicians to the community.[15] Three of the four physicians occupying the clinic testified that there was no turmoil in the clinic, much less that it was caused by Dr. Bell.[16] To the contrary, Dr. Bell was a cohesive force in the clinic, acting as an unofficial arbitrator and consensus-maker.[17] While never disclosed to Dr. Bell prior to the temporory injunction hearing, the defendants also apparently wanted to remove Dr. Bell because they considered him too demanding and because they desired to individually consider the occupancy of each physician separately.[18]

Dr. Bell was the object of a personal vendetta harbored against him by at least two of the defendants, Chairman Sellevold and Commissioner Block.[19] In 1980 the specific charges against Dr. Bell—that he was the cause of continuing turmoil which prevented the recruitment of additional physicians—were investigated by the governing board of the hospital and proven to be groundless.[20] Notwithstanding the result of this investigation, Commissioners Sellevold and Block continued to believe that Dr. Bell was the root of all problems.[21]

No other medical clinic exists in Day County. Further, it would be foolish for a physician to try to compete

---

[15]T-71a, 188, 193, 203, 239, Exhibit 2, A-40.

[16]T-11, 78a, 115, 120.

[17]T-9, 12, 78a, 79.

[18]T-209, 210, 234, 243, 244.

[19]T-129, 132-134, 179, 180, 247.

[20]T-127-130.

[21]T-132-134, 248.

with those in the county-owned clinic, who are subsidized.[22] Because of the unique nature of the growth of the medical community in Webster, an ejectment of Dr. Bell from the Day County Clinic is tantamount to ejectment from good standing in the medical community in the eyes of his patients and potential patients.[23]

Dr. Bell's reputation was damaged by the actions of the defendants, both because of the clear and necessary implication of his removal "because of continued internal problems on the medical staff", and because of his ejection from the medical community.[24] Subsequent to the events of September 19, Dr. Bell's medical practice diminished by at least half.[25] On at least one day he saw only three patients. Prior to September 19, he was the busiest physician in Webster.[26] If the board's decision stands, Dr. Bell must leave Webster, because he cannot practice elsewhere in Webster.[27]

On November 17, 1982 the defendants served a notice to quit on Dr. Bell under the state forcible entry and detainer statute. *SDCL* 21-16-2. Following Dr. Bell's refusal to vacate the premises, the defendants commenced a state unlawful detainer action by service of Summons and Complaint on November 23, 1982. This action was commenced on December 10, 1982.

---

[22]T-74a, 75a.

[23]T-18, 19.

[24]T-17, 36, 74a, 116.

[25]T-17, 72a.

[26]T-72a, 115.

[27]T-8, 72a, 76a, 77a, 116.

REASONS FOR ALLOWANCE OF WRIT

1. The circuit court departed from the accepted and usual course of judicial proceedings in awarding summary judgment relief to defendants in an appeal testing only the legality of a temporary injunction.

2. By ruling that the plaintiff was deprived of neither liberty nor property, the circuit court ignored the record and ruled contrary to the settled law of this Court and other circuits.

3. By ruling that plaintiff's equal protection rights were not violated, the circuit court ignored the record and ruled contrary to the settled law of this Court and other circuits.

4. By holding that the trial court did not have pendent jurisdiction, the circuit court ruled contrary to the decisions of this Court and decided an important federal question which should be decided by this Court.

———o———

ARGUMENT AND AUTHORITIES

1. The circuit court departed from the accepted and usual course of judicial proceedings in awarding summary judgment relief to defendants in an appeal testing only the legality of a temporary injunction.

Procedurally, this case reached the circuit court as an appeal from the issuance of a temporary injunction by the trial court. However, in effect, the circuit court's decision granted defendants' motion for summary judg-

ment as to plaintiff's property and liberty claims. Of necessity, the circuit court had to weigh the evidence and arrive at a result contrary to that of the trial court, notwithstanding the assertion by the appellate court that these were matters of law.

The circuit court relied exclusively upon the proposition that Dr. Bell's asserted right to occupy the clinic so long as he supported the hospital and maintained his license in good standing did not as a matter of law constitute a property right protectable by 42 *U.S.C.* 1983. While plaintiff disputes this, as discussed below, Dr. Bell's asserted property rights go far beyond that. Additionally, Dr. Bell has alleged and proved that occupancy of the clinic carries a unique status in this rural community in the eyes of potential and existing patients. Removal from the clinic, in and of itself, constitutes a *de facto* ejectment from good standing status in the medical community.

Further, membership on the medical staff of the hospital (which Dr. Bell so far retains) entitles a physician to occupancy in the clinic, since a county-owned hospital and a county-owned clinic under South Dakota statutory law are a single entity.[18] The record affirmatively sup-

---

[18] *SDCL* 34-8-1 provides:

> The board of county commissioners in any county in this state may establish and maintain or lease to be maintained a county hospital for the care and treatment of county charges, and such other persons as may apply for admission to such hospital. In this chapter, the term 'hospital' may be construed to mean a hospital, a medical facility and its equipment, a nursing home or a home for the aged.

(Continued on following page)

ports the proposition that, historically, all resident physicians admitted to practice on the medical staff of the hospital have likewise occupied the clinic. By resolution the defendants required that residents of the clinic be members of the medical staff of the hospital.[29] At their September 19 meeting, the defendants took action because of perceived "medical staff" problems, not *"tenant"* problems.[30]

Assuming that the hospital includes the clinic as mandated by state law, the trial court implicitly held that Dr. Bell's due process rights secured by the hospital medical staff by-laws were violated by his removal. Rights conferred under hospital staff by-laws are contractual in nature. *St. John's Hosp. M.S. v. St. John's Reg. M.C.*, 245 N.W. 2d 472 (S.D., 1976).

By statute, county hospitals may not discriminate between licensed practitioners.[31] Whether this can be char-

---

(Continued from previous page)

The 1969 amendment added the phrase "a medical facility and its equipment" to the statute and carried an emergency clause making it effective when approved, on March 25, 1969. While the statute is permissive in its terms, it is clear when read in context that the only way for a county to own a clinic is to do so in conjunction with a county owned hospital under this chapter of the code.

[29]The resolution, Exhibit 7, is set forth at A-36.

[30]See Footnote 32.

[31]*SDCL* 34-8-8.1 provides:

> A governing board of a hospital subject to Chapter 34-8 shall reasonably and properly determine, subject to the right of judicial review, the membership of the professional staff of the hospital and delineate the staff privileges, but it shall not discriminate between licensed practitioners of the various healing arts.

acterized as a property right, or a state guarantee of equal protection, this expectation of freedom from discrimination is a valuable right relied upon by Dr. Bell in his occupancy of the clinic.

Occupancy of the clinic in effect constitutes a financial subsidy designed for *all* physicians practicing in the hospital in Webster. Removal of Dr. Bell from the clinic premises unlawfully will deprive him of this financial subsidy. While plaintiff sincerely believes that he has a "property right" to occupy the clinic because of the recruiting representations made to him, as has been demonstrated, this is not the *sole* basis of his claim.

In holding that Dr. Bell had suffered no loss of liberty, the circuit court concluded that there had been no publication of stigmatizing reasons for their action. However, the record affirmatively shows that the September 19 meeting was a public meeting attended by the press, resulting in the publication of an account which justified the action ". . . because of continued internal problems on the medical staff."[32] Chairman Sellevold acknowledged this as being an accurate reflection of what was said at the Sunday meeting.[33] This publication, coupled with the subsequent action of the defendants reinstating the other two physicians, clearly points an accusing finger at Dr. Bell. To arrive at the conclusion that no stigmatizing reasons had been published by the defendants, the circuit court had to weigh the evidence. Furthermore, the mere act of removing Dr. Bell from the clinic, be-

---

[32]The front page story, Exhibit 8, appearing in the Webster "Reporter & Farmer", September 22, 1982 edition appears at A-38.

[33]T-193.

cause of the unique status of the clinic in Webster, damaged his business reputation. Again, in determining this not to have been the case, the circuit court had to weigh the evidence.

It is axiomatic that the denial of a motion for summary judgment is not an appealable order. *Upper Mississippi Towing Corp. v. West,* 338 F. 2d 823 (8th Cir., 1964). Where an appeal is warranted from the grant of a preliminary injunction, the merits of the denial of a motion for summary judgment are divisible from that order and should not be considered by the appellate court. *John Hancock Mut. Life Ins. Co. v. Kraft,* 200 F. 2d 952 (2nd Cir., 1953). Nowhere does it appear that the denial of a motion for summary judgment, absent certification under 28 U.S.C. 1292(b), in conjunction with the grant or denial of a preliminary injunction, is appealable as to the summary judgment issues. *Annotation,* 15 A.L.R. 3d 899, §§ 5 and 6.

2. By ruling that plaintiff was deprived of neither liberty nor property, the circuit court ignored the record and ruled contrary to the settled law of this Court and other circuits.

The circuit court concluded that the purpose of the September 19 meeting was to express the board's intention to go to court and was not intended to deprive Dr. Bell of property.[34] However, at that time they had con-

---

[34]The minutes of the September 19 meeting directly contradict the circuit court's conclusion that it was held merely for the defendants to decide to go to court to pursue their legal

(Continued on following page)

cluded that he was the cause of "continuing turmoil" in the clinic, a determination necessarily involving the weighing of facts and making an administrative determination. This determination necessarily placed Dr. Bell's liberty and property at risk, requiring notice and hearing. The circuit court seeks to equate Dr. Bell's property rights under the Fourteenth Amendment to the United States Constitution with a contract right defined under state law. This is contrary to the clear meaning of this court's decision in *Perry v. Sindermann*, 408 U.S. 593, 601, 33 L.Ed. 2d 570, 580, 92 S. Ct. 2694 (1972):

> We have made clear in *Roth*, supra, at 577, that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' *Id.* at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

The necessary implication of this pronouncement is that something less than a *proven* state law property right will constitute a "property" interest for due process pur-

---

(Continued from previous page)

remedies, as does the written termination notice sent to Dr. Bell. Both the minutes and the notice are set forth at A-37 and A-38. These indicate that the action taken by the board was final and not subjected to any further court proceedings. That action subject Dr. Bell to potential immediate removal under *SDCL* 43-8-10, which provides:

> After the notice prescribed by §§ 43-8-8 and 43-8-9 has been served in the manner therein directed, and the period specified by such notice has expired, but not before, the landlord may reenter or proceed according to law to recover possession.

poses. This was the holding of the trial court, based upon the uncontradicted record that Dr. Bell could occupy the clinic so long as he supported the hospital and so long as his medical license remained in good standing, that clinic occupancy was accorded to all physicians who were members of the hospital medical staff residing in Webster, that state law treated the clinic and hospital as one entity (to which the procedural safeguards of the staff bylaws would apply), and that state law prohibited discrimination against one physician in favor of others.

The guarantees of the Constitution apply to administrative as well as to judicial proceedings. *Application of Union Carbide Corp.*, 308 N. W. 2d 752 (S. D., 1981). The requirement of due process in such circumstances has always been a part of South Dakota law. In *Caldwell v. Pierson*, 37 S. D. 546, 159 N. W. 124 (1916) the court held:

> Due process of law applies to administrative and executive action by which one may be deprived of property as well and just the same as it does to judicial action. A person may be deprived of property by administrative action where the person whose property is to be so taken is provided no opportunity for hearing by the statute. *Id.* 37 S. D. at 554, 159 N. W. at 126.

By its ruling, the circuit court ignored its own precedent, *Klinge v. Lutheran Charities Association*, 523 F. 2d 56 (8th Cir., 1975), which held that while a physician does not have a constitutional right to practice medicine in a hospital, the physician may expect procedural due process to protect his right not to be expelled without valid cause related to his professional capabilities and conduct. The court also ignored its ruling that a physician has a constitutional right to practice medicine free from arbitrary

and unreasonable governmental restraint. *Nyberg v. City of Virginia*, 495 F. 2d 1342 (8th Cir., 1974).

The decision of the circuit court not only ignores its own precedent and that of this Court, but also conflicts with the decisional law of other circuits:

(a) *Escalera v. New York City Housing Authority*, 425 F. 2d 853 (2nd Cir., 1970), tenants in a public housing project are entitled to due process prior to termination of tenancy and a civil rights action should not be dismissed at the pleadings stage unless it appears with certainty that the plaintiffs are entitled to no relief under any state of facts;

(b) *Chavez v. City of Santa Fe Housing Authority*, 606 F. 2d 282 (10th Cir., 1979), tenants of a public housing authority are entitled to procedural due process prior to damage assessments sought to be imposed without prior notice and hearing;

(c) *Conley v. Board of Trustees, Grenada County Hosp.*, 707 F. 2d 175 (5th Cir., 1983), county hospital employees have a constitutional property interest in continued employment where applicable statutes do not specify whether employment was terminable at will and where hospital's own rules support a finding of a mutually explicit understanding toward continued employment absent dismissal for cause;

(d) *Northeast Georgia Radiological Assoc. v. Tidwell*, 670 F. 2d 507 (5th Cir., 1982), radiologist under contract including an understanding that procedural due process protections under medical staff by-laws would apply to medical staff privileges stated a property right in a civil rights action; and

(e) *Kay v. North Lincoln Hosp. Dist.*, 555 F. Supp. 527 (D. C., Ore., 1982), terminated hospital x-ray technician entitled to procedural due process to protect a property interest where employment contract

did not specify a term but evidence established a reasonable expectation of employment based upon state law, rules or regulations for discharge, or an express or implied promise of continued employment.

Insofar as plaintiff's liberty interests are concerned, the record clearly shows that plaintiff's business reputation was not merely theoretically damaged, but was damaged to the extent that his practice was markedly reduced. The circuit court suggests that no publication occurred, but this required a weighing of the evidence and is contrary to the record. The reasons for the September 19 action were published and, in any event, the uncontradicted record clearly supports the proposition that in this small town the mere act of removing plaintiff from the medical community damaged his reputation.[35] Therefore, plaintiff is entitled to redress under the civil rights statutes. *Wisconsin v. Constantineau*, 400 U. S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971); *Board of Regents v. Roth*, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Marrero v. City of Hialeah*, 625 F. 2d 499 (5th Cir., 1980).

---

[35]In a conference in chambers with the trial court, commencing at page 50 of the transcript, one of defendants' counsel substantiated that there is wide community knowledge of this situation:

> MR. VANDER LINDEN: If I may, Your Honor. In a little community like Webster, the hospital is the biggest business that we have in the whole town and in the whole county and this lawsuit and the controversy that we have going here in Federal Court and State Court touches above every life and every human being in that county and it's caused some problems now that I am personally afraid of the consequences if we don't get it resolved one way or the other. I have lived there for forty-four years and I know the county and the people as well as anybody and it's a terrific mess right now.

The position taken by the defendants in this case speaks most eloquently for the proposition that this is considerably more than a mere landlord-tenant dispute, and that plaintiff is more than a mere leasehold owner subject only to state law to define his property rights. In their "reasons" letter of November 23, 1982, the defendants conclude that plaintiff is the cause of continuing turmoil in the clinic adversely affecting the Day County Hospital and the ability of the defendants to recruit new physicians to the community.[36] Thus, they have elevated occupancy in the clinic to a considerably higher position than that of a mere leasehold interest. They are conceding that occupancy in the clinic carries a unique status in the community and that the clinic and hospital are one entity.

3. By ruling that plaintiff's equal protection rights were not violated, the circuit court ignored the record and ruled contrary to the settled law of this Court and other circuits.

Admittedly, plaintiff does not claim that he was the victim of racial or other class-based animus. However, the circuit court was incorrect in suggesting that no claim was made that plaintiff was being evicted because of some irrational classification adopted by the board. To the contrary, this was the very basis of plaintiff's contention that no rational basis exists for defendants to oust plaintiff from the clinic. Clearly, where a rule or statute is fair on its face, but unequally applied to those in a similar position intentionally or with purposeful discrimination, a violation of the equal protection clause

---

[36]Exhibit 2, A-40.

exists. *Snowden v. Hughes*, 321 U. S. 1, 8, 64 S. Ct. 397, 88 L. Ed. 497, 502 (1943). Assuming that the defendants have classified occupancy in the clinic so as to make trouble makers unwanted tenants, then this rule must be equally applied to all physicians without intentional discrimination against any one of them. This is what was pleaded and proved by the plaintiff, that is, that plaintiff was at the very least no more blameworthy than any other tenant, and the true reason for plaintiff's ouster was personal animosity harbored by the defendants against the plaintiff. The defendants have either irrationally classified trouble makers or discriminatorily classified Dr. Bell as a trouble maker. Finally, the circuit court did not consider the anti-discrimination statute, *SDCL* 34-8-8.1, when it concluded that plaintiff had not been denied equal protection.

No rational basis existed for the defendants to treat plaintiff any differently than any other physician occupying the clinic. *Mansell v. Saunders*, 372 F. 2d 573 (5th Cir., 1967); *Foster v. Mobile County Hospital Board*, 398 F. 2d 227 (4th Cir., 1968).

Incidentally, the circuit court also mischaracterized Dr. Bell's position with respect to his right to "substantive due process". That court suggested that Dr. Bell takes the position that he has a constitutional right, no matter what procedures are employed, to occupy the county-owned clinic. Substantive due process requires that the defendants have a good reason for doing that which they did. The evidence at the hearing suggests that they had no reason other than personal animosity toward Dr. Bell, which would legally constitute arbitrariness, capriciousness or unreasonableness, thus violating Dr.

Bell's right to substantive due process. *Klinge v. Lutheran Charities Association of St. Louis,* supra; *Foster v. Mobile County Hospital Board,* supra.

4. By holding that the trial court did not have pendent jurisdiction, the circuit court ruled contrary to decisions of this Court and decided an important federal question which should be decided by this Court.

As the trial court indicated in its oral opinion, the federal case and the state case both arise out of a common nucleus of operative fact. The circuit court concluded that the assertion by the trial court of pendent jurisdiction over the state unlawful detainer action would constitute a type of "involuntary removal". However, the circuit court then embarks upon a justification of its decision based upon a misapprehension of the record. The circuit court concludes that the complaint must state a pendent state claim, together with federal claims over which the court has jurisdiction, for the trial court to assert pendent jurisdiction. One of the claims asserted in the complaint is a claim for injunctive relief, cognizable in either federal or state court. In addition to the federal constitutional grounds urged for equitable relief, the plaintiff also urges a violation by the defendants of the state anti-discrimination statute and of the statute determining the clinic and hospital to be one entity, to which the hospital staff by-laws apply. Under *SDCL* 21-8-14 an injunction may be granted to prevent the breach of an obligation existing in favor of the plaintiff where damages would not afford adequate relief or where a multiplicity of judicial proceedings must be prevented. Thus, a pendent state claim is stated together with the federal claims. As was stated by this court in *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 725, 16 L. Ed. 2d 218, 227, 86 S. Ct. 1130 (1966):

> Pendent jurisdiction, in the sense of judicial *power* exists whenever there is a claim "arising under [the] Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . .," U. S. Const., Art. III, 2 and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.

Thus, the exercise by the trial court of pendent jurisdiction, while not necessary to the determination of the case if the temporary injunction were to stand, was proper.

CONCLUSION

Is a physician entitled to the same constitutional protections afforded any other citizen? Does the United States Constitution transcend groundless provincial manipulations of local authorities? An affirmative answer to either question requires that this petition be granted. For all the reasons set forth herein, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

David A. Gerdes
of May, Adam, Gerdes & Thompson
503 South Pierre Street
P. O. Box 160
Pierre, South Dakota 57501
(605) 224-8803

Thomas E. Klinkel
of Richardson, Groseclose,
Kornmann, Wyly, Wise and Klinkel
One Court Street
P. O. Box 1030
Aberdeen, South Dakota 57401
(605) 225-6310

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

CIV. 82-1062

ELDON E. BELL,

Plaintiff,

v.

CHESTER SELLEVOLD, ALVIN BLOCK, ARDIS ABBOTT, ORVILLE HEIN, and CHARLES HESLA, Individually and as the Board of County Commissioners of Day County; and DAY COUNTY, an organized County of the State of South Dakota,

Defendants.

ORDER

(Filed January 24, 1983)

The Court having heard and considered the evidence and proofs of the parties at hearings in Aberdeen, South Dakota on January 3, 1983 and in Pierre, South Dakota on January 24, 1983, and further having considered the legal authorities of the parties and now on motions pending before the court and upon the court's findings of fact and conclusions of law heretofore announced in open court it is

ORDERED and ADJUDGED that plaintiff's motion for temporary injunction is hereby granted and defendants are hereby restrained and enjoined from interfering, by any act or in any manner whatsoever, with plaintiff's use and possession of his present medical office in the

Clinic in Webster, South Dakota, and defendants are restrained and enjoined from doing or counseling the doing of any act whatsoever to dispossess plaintiff from said office. Plaintiff shall continue to pay rentals due Day County into a special bank account for that purpose available to Day County; and it is further

ORDERED that defendant's motion to dismiss filed herein is denied. It is further

ORDERED that this action shall be tried on the merits by jury at Aberdeen, South Dakota on March 14, 1983 at 9:30 o'clock, a.m. The preliminary injunction herein awarded in favor of plaintiff against defendant shall remain in effect until rendition of judgment in the above action.

Dated January 24, 1983.

BY THE COURT:

/s/ DONALD J. BATES
United States District Judge

ATTEST:

WILLIAM F. CLAYTON, Clerk

BY: KATHLEEN M. TURBIVILLE
Deputy

(Seal of Court)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1168, 83-1235

No. 83-1168

Eldon E. Bell,

Appellee,

v.

Chester Sellevold, Alvin Block, Ardis Abbott, Orville Hein, and Charles Hesla, individually and as members of the Board of Commissioners of Day County, South Dakota; and Day County, an organized county of the State of South Dakota,

Appellants.

No. 83-1235

In re Day County, South Dakota,

Petitioner.

On Appeal from the United States District Court for the District of South Dakota.

On Petition for Writ of Prohibition to the United States District Court for the District of South Dakota.

Submitted: May 18, 1983
Filed: August 15, 1983

Before ROSS, ARNOLD, and JOHN R. GIBSON, Circuit Judges.

ARNOLD, Circuit Judge.

This case involves the efforts of Day County, South Dakota, to evict Eldon E. Bell, M.D., from space he has been using in a medical clinic in Webster, South Dakota, owned by the county. The governing body of the county, the Board of County Commissioners, brought an action against Dr. Bell in a state court for forcible entry and detainer, claiming that he was holding over wrongfully after expiration of a lease. Dr. Bell then brought this suit in the United States District Court for the District of South Dakota, claiming, among other things, that the county was depriving him of property (his right to use and occupy the clinic) and liberty (his reputation as a physician) without due process of law. The District Court granted Dr. Bell's motion for preliminary injunction and forbade the defendants to do anything to dispossess him (including prosecuting the state-court action) until the case could be tried on its merits in the federal court. Because we believe that defendants have not deprived Dr. Bell of either liberty or property, we reverse.

I.

Dr. Bell came to Webster in 1969. By all accounts, he is an exemplary physician and surgeon, and no one on either side of this controversy questions either his integrity or his medical ability and judgment. Since coming to Webster, he has been a member of the professional staff of the Day County Hospital, operated by the county under S. D. Codified Laws Ann. §§ 34-8-1 to -23 (1977 & Supp. 1982). He has also used as his office for the practice of medicine space in a clinic owned by the county. In September of 1982, the Board of County Commissioners became disatisfied with what it felt was "turmoil" among the physicians occupying the clinic. The details of the personal differences among the parties are not immediately material for present purposes. Suffice it to say that the Board thought, for whatever reason, that Dr. Bell was chiefly responsible for the "turmoil." On September 19, 1982, the Board voted to terminate the leases of all but one of the four physicians at the clinic, including Dr. Bell. After at least two more meetings, the Board relented as to two of the three terminated tenants, but it refused to change its mind as to Dr. Bell. On November 23, the Board sued Dr. Bell in the Circuit Court for the Fifth Judicial District of South Dakota. The action was brought under the South Dakota forcible-entry-and-detainer statutes, S.D. Codified Laws Ann. §§ 21-16-1 to -12 (1979).

On December 10, 1982, before any proceedings of substance had occurred in the state court, Dr. Bell brought this suit. His complaint alleged claims under 42 U. S. C. § 1983, 42 U. S. C. § 1985, and the antitrust laws. Both damages and equitable relief were requested. On Janu-

ary 3 and 24, 1983, the District Court, moving with commendable promptness, held an evidentiary hearing on plaintiff's motion for preliminary injunction. The main question of fact contested at the hearing was what promises had been made Dr. Bell to persuade him to come to South Dakota to practice medicine. He contended, and evidence was presented to support the contention, that a representative of the county—not a member of the Board of County Commissioners, but a person orally authorized by the Board—had promised him in 1969 that he could use the clinic as his office for the practice of medicine indefinitely, as long as he continued to practice in Webster and maintained his good standing as a licensed physician. The defendants argued, among other things that even if such an oral promise was made, it was legally unenforceable for at least two reasons: not being in writing, nor having been authorized in writing, it was invalid under the statute of frauds; and it was inconsistent with the only written lease that Dr. Bell and the county had ever signed, a one-year lease that expired by its own terms on December 31, 1972. (At one time plaintiff claimed that this lease had been automatically renewing itself from year to year, but he has now announced his intention to abandon this contention. Brief for Appellee 18.) Thus, so far as the law of property is concerned, the positions of the parties come down to this: defendants say Dr. Bell was a tenant from month to month under an oral agreement, which they have terminated, and plaintiff says he has a right, under another oral agreement, to remain in the clinic as long as he practices medicine in Webster.

At the conclusion of the hearing the District Court ruled from the bench and granted plaintiff's motion for

preliminary injunction. The court made appropriate findings on the balance of equities and held that plaintiff had shown the requisite likelihood of success on his claim that the county had deprived him, or was about to deprive him, of a "property or liberty interest." Tr. 259, without due process of law. On the same day, January 24, 1983, a written order was entered restraining the defendants "from interfering . . . with plaintiff's use and possession of his present medical office in the Clinic in Webster, South Dakota." Designated Record (D.R.) 75. The order was to remain in effect until final judgment in the federal suit, and provided that until that time Dr. Bell would pay his rent into a special bank account. The effect of the order, of course, was to prohibit defendants from prosecuting their state-court action for possession of the disputed premises, and no further action in that case has taken place. The District Court also denied defendants' motion to dismiss the complaint, which it had earlier properly agreed, Tr. 48, to treat as a motion for summary judgment. Defendants appeal, claiming that the motion for preliminary injunction should have been denied, and that their motion for summary judgment should have been granted.

In the course of its oral opinion, the District Court, following up on a suggestion it had made to counsel earlier, also ruled that it had and would exercise "pendant jurisdiction in the State claim." Tr. 267. By this the court seems to have meant that it would try, in the federal forum, not only the plaintiff's suit under 42 U. S. C. § 1983 and the other federal statutes pleaded, but also the defendants' forcible-entry-and-detainer proceeding, originally filed in the state court. Counsel for plaintiff asked if the

court's order would "provide that the Court is accepting pendent jurisdiction and ordering the State Court files to be delivered to the Federal Court," Tr. 266, and the District Court replied:

> I am reluctant to order the State Court to do anything. I rely on the State Court to do what is right, and I have now ordered that this entire action be tried in this Court, jury demanded, I granted that.

Ibid. No written order signed by the District Court was ever entered embodying this apparent decision to exercise "pendent jurisdiction" over the state-court action. Defendants, in addition to their appeal already described, have also petitioned us for a writ of prohibition to command the District Court not to exercise any such "pendent jurisdiction."

II.

The preliminary injunction rests entirely on the premise that defendants are depriving plaintiff of either liberty or property without due process of law, or, at any rate, that plaintiff is likely at trial to succeed on his claim that they are doing so. Normally our review of orders granting or denying a preliminary injunction is limited to determining whether the District Court has abused its discretion. That is not true, however, where the question presented is purely one of law. "[O]n questions of law we owe no deference in any formal sense to the District Court." *Chu Drua Cha v. Noot,* 696 F. 2d 594, 599-600 (8th Cir. 1982) (vacating denial of preliminary injunction). If the District Court's order granting preliminary relief rests on a legal basis that we believe to be mistaken, then we may and should reverse, whatever the relative equities of the parties may be. For in that event whatever injury

the plaintiff may suffer, irreparable or not, will simply be the result of the application of a correct rule of law. Here, we are firmly convinced as a matter of law that defendants have deprived Dr. Bell of neither liberty or property, as those terms are used in the Fourteenth Amendment. This being so, the whole basis of a Section 1983 action on a procedural-due-process theory fails.

The plaintiff argues that he should have been given notice and some kind of hearing before the Board met and voted to terminate his occupancy of the clinic. The Board's vote, however, deprived him of no property. It merely expressed the Board's intention to go to court to try to get Dr. Bell out of the clinic. Plaintiff is still in the clinic, and has been continuously ever since the Board's meeting. His hospital staff privileges have not been disturbed, nor has anyone indicated that any effort will be made to disturb them. He argues that the very decision by the Board to sue him for possession should have been preceded by notice and hearing, but we disagree for at least two reasons. First, a rule requiring notice and hearing before any public body decides to go to court to assert its rights in property would paralyze local government in an important part of its responsibilities. And second, whether plaintiff has a property interest in the first place is the question to be decided by the state court in the Board's suit. He has no property right not to be sued for possession. Like any other party to a lease, he is liable to suit by another party seeking a determination of its rights under the lease. At common law, a landlord could enter and expel by force a tenant holding over wrongfully, see *Lindsey v. Normet*, 405 U. S. 56, 71 (1972), and a public body taking such action would perhaps be bound to give

the tenant notice and hearing beforehand. But that is not this case. Here, the Board has simply sought the aid of the courts in establishing a property right that, if its view of the law is correct, it has always had.

If Dr. Bell were, as a result of the state-court proceedings, about to be evicted without due process, he might have a case. But he does not claim that the South Dakota forcible-entry-and-detainer procedure itself violates the Due Process Clause. Nor could such a claim succeed, in light of *Lindsey v. Normet, supra,* in which the Supreme Court upheld, against due-process and equal-protection challenges, most features[1] of an Oregon statute that was procedurally less generous to tenants than the South Dakota scheme. In South Dakota, the procedures in actions for forcible entry and detainer is in most respects the same as in other actions. S.D. Codified Laws Ann. § 21-16-6 (1979). A jury may be demanded. There are provisions for a quick trial, but a tenant may secure a continuance (as in Oregon) by posting a bond for the payment of rent and costs of suit, *id.* § 21-16-7. In Oregon defenses such as unconstitutionality of the proceeding, failure of consideration, and unclean hands could not be raised, see 405 U. S. at 66-67 n. 12, but in South Dakota equitable defenses such as estoppel and waiver may be asserted. *Jordan v. Duprel,* 303 N. W. 2d 796, 799 (S. D. 1981); *Heiser v. Rodway,* 247 N. W. 2d 65, 68 (S. D. 1976) ("evidence pertinent to the issue of possession is properly admissible in an unlawful detainer action, even though the evidence is equit-

---

[1]One feature of the Oregon statute, requiring the posting of a double bond as a prerequisite to a tenant's appeal, was held violative of equal protection, 405 U. S. at 74-79, but the South Dakota statutes contain no such provision.

able in nature.") (footnote omitted). The apparently contrary holding in *Aegerter v. Hayes,* 55 S. D. 337, 342, 226 N. W. 345, 347 (1929), was disapproved in *Heiser.*

The major defense raised by Dr. Bell in his answer in the state court, Brief of Appellants App. 1-4, is that he is entitled to possession of the clinic under the alleged oral agreement made in 1969. This defense immediately concerns the right of possession, and we have no doubt that it is properly raised in the state court, along with any related theories of estoppel, as, for example, that even if the oral agreeemnt is void for some reason, the plaintiff's long performance under it should estop the county to attack it. Plaintiff has not pleaded in the state court any federal defenses, but we have no reason to doubt that they would be entertained, assuming they related to his right of possession. Indeed, the state courts would probably be constitutionally compelled to hear and decide any federal defenses. See *Testa v. Katt,* 330 U. S. 386 (1947), reaffirmed in *Federal Energy Regulatory Commission v. Mississippi,* 456 U. S. 742, 760-63 (1982). In short, defendants have not deprived plaintiff of his property, and if he loses possession of the clinic in the future, it will only be in accordance with the judgment of a state court, in a proceeding fully consistent with due process, that he has no right to remain.

So much for property. Plaintiff also claims that he was deprived of liberty because the Board's vote to go to court to evict him damaged his reputation in the community and reduced his clientele. There is a line of public-employee cases holding that a public body may not discharge anyone—even an employee without a contractual or property right in his job—and make public reasons for

the discharge involving stigma or obloquy, without giving the employee a right to clear his or her name at some kind of a due-process hearing. We assume *arguendo* that the same reasoning could be made to apply to a termination of a lease. The liberty theory still must fail, because defendants never made public any stigmatizing reasons for their action. They simply voted to sue Dr. Bell for possession. No reasons at all were given in public. The accusation that Dr. Bell was responsible for "turmoil" came in a letter written to him at his own lawyer's request. The letter is now public because plaintiff introduced it as an exhibit (PX 2) at the hearing on his motion for a preliminary injunction. *Bishop v. Wood*, 426 U.S. 341, 347-50 (1976), holds that there is no deprivation of constitutionally protected liberty in such a situation. *Accord, Kyles v. Eastern Nebraska Human Services Agency*, 632 F. 2d 57, 61-62 (8th Cir. 1980).

It would still be possible to affirm the preliminary injunction if plaintiff had a viable equal-protection theory, assuming the other requirements for interim relief were met, and the parties have briefed this issue, though equal protection does not seem to have been part of the District Court's rationale. But only a moment's reflection is needed to convince us that this is not an equal-protection case. There is no claim that plaintiff is the victim of racial or other class-based animus, nor that he is being evicted because of some irrational classification adopted by the Board. He vigorously insists that the Board was mistaken, perhaps even motivated by personal dislike; that there was no "turmoil" at the clinic, or that in any event he is no more responsible for it than anyone else. He may be right; but that is not at all the same thing as a denial

of the equal protection of the laws. The Supreme Court has warned that "[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised . . . decisions," *Bishop v. Wood, supra,* 426 U. S. at 350, and the same is true of the Equal Protection Clause.

The suggestion that "substantive due process" has been violated may be equally briefly disposed of. The argument is, if we understand it, that plaintiff has a constitutional right, no matter what procedures are employed, to occupy the county-owned clinic. We reject this contention. "'A doctor has no constitutional right to practice medicine in a public hospital,'" *Klinge v. Lutheran Charities Association,* 523 F. 2d 56, 61 (8th Cir. 1975) (quoting *Woodbury v. McKinnon,* 447 F. 2d 839, 842 (5th Cir. 1971)), and it must follow *a fortiori* that he has no such right, independent of state property law, to use and occupy public property. It remains true, of course, that a citizen may not be deprived of employment, occupancy of land, or any other significant interest for a constitutionally impermissible reason, like race or religion, but that is not plaintiff's claim here.[2]

For these reasons, we hold that plaintiff has not made out a viable claim under 42 U. S. C. § 1983. He has no likelihood of success on the merits of the § 1983 claims so far pleaded. The preliminary injunction must therefore be reversed.

---

[2]Plaintiff intends to ask leave to amend his complaint to assert a First Amendment theory—that he is being ejected because he is "too demanding." Brief of Appellee 18-19. We express no view on the merits of such a theory, and our action today is without prejudice to plaintiff's right to advance it.

II. (sic)

Defendants also appeal from the District Court's denial of their motion for summary judgment. They argue that they are immune from suit because they acted in good faith as that term has recently been redefined by the Supreme Court in *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982):

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

We have recently held, in *Evans v. Dillahunty*, No. 82-2362 (8th Cir. June 30, 1983), "that motions for summary judgment and motions to dismiss that are premised on absolute or qualified immunity are immediately appealable [if] . . . [t]he essential facts are not in dispute . . . and . . . the determination of whether the government official is entitled to immunity is solely a question of law." Slip op. at 4 (footnote omitted).

We need not decide whether the District Court's order in this case meets these criteria for appealability, because the immunity issue is, at least for the present, not a live one. In Part I of this opinion we have considered each of the bases for § 1983 relief thus far pleaded by the plaintiff and held that they are untenable. On the present state of the record, therefore, defendants would be entitled to dismissal of the § 1983 claims pleaded in the complaint, quite apart from any defense of good-faith or qualified immunity. If, on remand, plaintiff does move for leave to amend his complaint to assert a § 1983 claim based on a

First Amendment theory, if this motion for leave to amend is granted, if the new theory thus pleaded is held to state a claim for relief, if defendants again move to dismiss on the basis of good-faith immunity, and if this motion is denied, then a new appeal could be taken of which we might have jurisdiction. For the present, however, discussion of the immunity issue, either as to jurisdiction or as to its merits, would be pointless. To the extent that defendants now seek to raise this question on appeal, therefore, their appeal will be dismissed as moot. (There remain in the complaint, of course, theories based on 42 U. S. C. § 1985[3] and the antitrust laws, but we do not understand defendants to be asserting the immunity defense to these theories.)

III.

We now turn to No. 83-1235, in which Day County as petitioner seeks a writ of prohibition commanding the District Court not to exercise "pendent jurisdiction" over the forcible-entry-and-detainer action pending in the state court. Extraordinary writs are granted only sparingly, and never simply because of disagreement with a district court on a question of law. We are persuaded, however, that this case falls squarely within the narrowest concept

---

[3]In view of our discussion of the Equal Protection Clause in Part I of this opinion, it is hard to see how a § 1985 claim could succeed. The only portion of that section that appears even arguably applicable in this case is § 1985(3), which requires that some racial or other class-based animus be alleged, a requirement that, as we have seen, is not met here. It is possible, however, that the § 1985 claim, along with the antitrust claim, may be further developed in discovery or by amendment to the pleadings, and our disposition of this appeal is without prejudice to such further development.

of the writ of prohibition: that is, it represents an apparent decision by a district court to exercise jurisdiction that it clearly does not have, in a situation where the wrongful exercise of jurisdiction cannot be effectively corrected by appeal after final judgment. See *In re South Dakota*, 692 F. 2d 1158, 1161 (8th Cir. 1982):

> If the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy.

(Quoting *Ex parte Chicago, Rock Island & Pacific Railway*, 255 U. S. 273, 275 (1921).)

In theory, we suppose it is possible to argue that any error committed could be corrected on defendants' appeal from a final judgment against them, assuming that such a judgment occurs. We disagree with this position for several reasons. First, defendants will not necessarily lose on the merits. If plaintiffs lose, they could appeal, but would presumably not contest the District Court's exercise of "pendent jurisdiction," since they themselves urged that jurisdiction upon the District Court. In that event, the jurisdiction of the state courts over a case properly brought before them would have been usurped, and no remedy would be available. Even if defendants do lose on the merits, we think their right to try their state-law action in the state courts is so fundamental, and so clearly outside the jurisdiction of the federal courts, that they should not be compelled to go through a federal trial. An appeal from an adverse judgment, even a successful appeal, would not undo the fact that defendants had been unlawfully compelled to try their case in a federal forum.

Counsel for Dr. Bell, in his capacity of respondent in the prohibition case, argues that the writ should never be granted unless the entitlement to it is clear, and that, since no case has held that pendent jurisdiction may not be exercised in a situation like that presented here, it cannot be said that there was a clear excess of jurisdiction on the part of the District Court. We disagree. No case has ever held that jurisdiction may not be exercised in this situation simply because no court has ever asserted such jurisdiction, probably because, for reasons we will shortly explain, such an assertion is clearly unauthorized.

The Supreme Court has most recently explained the doctrine of pendent jurisdiction in *United Mine Workers of America v. Gibbs*, 383 U. S. 715, 724 (1966):

> [I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

(Footnote omitted.) The whole premise of this doctrine is that two claims have been tendered for decision by some party, either a plaintiff, a counterclaimant, a third-party claimant, or some other party in a similar position. If, for example, the plaintiff here, in addition to his federal claims, had pleaded in his federal-court complaint that his eviction would violate state law, either common or statutory, the federal court would in all likelihood have pendent jurisdiction of that state-law claim, despite the absence of complete diversity among the parties. The situation here is quite different. Plaintiff is asserting a federal claim in a federal court, but the other claim, the one over which the District Court seems to intend to exer-

cise "pendent jurisdiction," is not in the federal court at all, nor is it a claim belonging to the plaintiff. It is, instead, a claim being asserted in a state court by the federal-court defendants. Such a claim, one originally brought in a state court, can get into a federal trial court only by removal, and removal requires the filing of a petition by the state-court defendant, as well as the meeting of statutory grounds, neither of which conditions has or can occur here. What the District Court seems to have done here amounts to a kind of involuntary removal, and there is simply no authority in the statutes for such a procedure. The district courts, like this Court, are courts of limited jurisdiction, and they may not exercise power not conferred upon them by Congress. We must be especially alert to maintain these limits when to transgress them would encroach upon the well-recognized and traditional power and duty of the state courts to decide state-law claims properly brought before them.

It is true, as the District Court remarked in its oral opinion, that the federal case and the state case both arise out of a common nucleus of operative fact. That alone, however, is an insufficient basis to justify the assertion of federal jurisdiction over a separate lawsuit brought in a state court. The terms "federal claim" and "state claim" as they are used in the pendent-jurisdiction context refer to the law that creates or governs the respective claims as a substantive matter. They do not refer to the forum in which the claims are pending. In other words, in order for the question of pendent jurisdiction even to arise, there must be before the federal court a claim arising under or governed by federal law and a claim arising under or governed by state law, over which the federal court has no

independent basis of jurisdiction. *Wrist-Rocket Manufacturing Co. v. Saunders Archery Co.*, 578 F. 2d 727 (8th Cir. 1978), cited by the District Court in its opinion, is such a case. There, the plaintiff asserted a federal claim under the Lanham Act and a pendent state claim for breach of fiduciary duty, and we held that the District Court had jurisdiction to hear the state-law claim as well as the Lanham Act claim.

The District Court was understandably concerned about the possible duplication of effort and expense that would occur if the two lawsuits, Dr. Bell's federal case and the County's state case, were allowed to proceed at the same time. We share this concern, but there are a number of answers to it. First, the District Court's grant of preliminary injunctive relief, which we have reversed for other reasons, necessarily meant that the state-court case would not go forward, because defendants were forbidden to prosecute it. Second, the simultaneous prosecution of *in personam* actions in federal and state courts is simply one of the costs that we pay for a federal system. The leading case is *Kline v. Burke Construction Co.*, 260 U. S. 226, 230 (1922), in which the Court held that when two *in personam* actions, although based on the same claim, are pending, one in a federal court and one in a state court,

> [e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any

> other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

One of the courts may choose, in the exercise of its own discretion, to stay the proceedings before it, or one of the courts may choose, if the law and the facts justify such action, to enjoin the parties from prosecuting their suit before the other forum. But if neither of these events occurs, the cases may proceed in parallel, and whichever one comes first to judgment becomes *res judicata* as to the other. For this reason, to take the present case as an example, the District Court's concern for duplication may have been overstated, because, even if the state proceeding had been permitted to go forward (as it now will be because of our reversal of the preliminary injunction), the question of entitlement to possession of the clinic would not have to be litigated twice. Whichever court decides it first would, assuming all of the other requirements of *res judicata* are met, conclude the other.

We hold, therefore, that the petition for writ of prohibition is well taken. We nevertheless believe it unnecessary to direct the clerk actually to issue the writ. For one thing, we are not certain that the District Court really intended to draw unto itself the state-court action as such. In the course of its oral opinion, the Court correctly noted that the taking of pendent jurisdiction was not necessary, because the issue of the right to possession of the clinic would, for reasons we have just now explained, be determined at trial, whether or not the state-court case remained pending in the state forum. In fact, it seems likely

that the District Court, for just this reason, may later have thought better of its orally announced intention to assume pendent jurisdiction. The parties apparently submitted to the Court an order embodying this decision in writing, but no such order was ever signed and filed with the clerk. We are not certain, in other words, that the District Court intended to follow through on its oral remarks, and, in any case, we are confident that formal issuance of the writ will not be necessary.

IV.

In No. 83-1168, the order granting plaintiff's motion for preliminary injunction is reversed. The defendants' appeal from the denial of their motion for summary judgment is dismissed as moot, and the cause is remanded for further proceedings in accordance with this opinion, looking towards resolution of plaintiff's claims based on 42 U. S. C. § 1985 and the federal antitrust statutes, as well as any amended § 1983 theory he may assert based on the First Amendment. In No. 83-1235, the petition for writ of prohibition is granted, but the clerk will withhold issuance of the writ, subject to the right of petitioner to apply for relief later in the event (which we do not now foresee) of its being necessary.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civ. No. 82-.....

ELDON E. BELL,

Plaintiff,

vs.

CHESTER SELLEVOLD, ALVIN BLOCK, ARDIS ABBOTT, ORVILLE HEIN, AND CHARLES HESLA, BOTH INDIVIDUALLY AND AS THE BOARD OF COUNTY COMMISSIONERS OF DAY COUNTY; AND DAY COUNTY, AN ORGANIZED COUNTY OF THE STATE OF SOUTH DAKOTA,

Defendants.

COMPLAINT

Comes now the plaintiff and for his cause of action against the defendants, states and alleges as follows:

COUNT ONE

(Deprivation of Due Process Rights)

1. Plaintiff is a citizen of the State of South Dakota and the defendants are all citizens of the State of South Dakota and residents of this judicial district.

2. The matter in controversy exceeds $10,000.00, exclusive of interest and costs, and this action arises under 42 U. S. C., Sections 1343, 1983 and 1985 and 15 U. S. C., Sections 1 and 15, and this court has jurisdiction of the action under 28 U. S. C. Sections 1331, 1337 and 1343.

3. The Day County Commission ("Commission") voted to evict plaintiff from the Day County Medical Clinic

Building ("Clinic") wrongfully and in violation of plaintiff's civil rights, as a result of which plaintiff has been damaged and is entitled to injunctive relief to remain on the Clinic premises. The Commission has conspired with others to deprive plaintiff of his civil rights, and to form a combination or conspiracy in restraint of trade or commerce among the states affecting plaintiff's right to practice medicine.

4. The Commission, and the individuals comprising it, at all times material hereto were acting under color of state law in owning, maintaining and operating a hospital and clinic building pursuant to SDCL 34-8 and in taking those wrongful actions alleged herein with respect to plaintiff.

5. Those acts alleged herein to have been taken by the Commission within the lawful scope of the duties of the Commission are the acts of Day County, for which it is responsible. Those acts which were taken by Commission members outside the lawful scope of their duties are their individual responsibility.

6. At all times material hereto, plaintiff was a physician practicing medicine in the Clinic and was a member of the medical staff of the Day County Hospital. Plaintiff has occupied the Clinic pursuant to a written lease dated January 12, 1971, which by operation of law thereafter continued from year to year on a calendar year basis. As a physician practicing medicine in the Clinic, plaintiff was entitled to practice his profession free from arbitrary and unreasonable restraints by defendants under the Fourteenth Amendment to the United States Constitution. Furthermore, plaintiff had a business reputation and goodwill

developed in Day County by virtue of his practice in the Clinic since October 14, 1969.

7. Occupation of the Clinic by plaintiff and other physicians practicing medicine in Webster, South Dakota is a necessary, valuable and indispensable right for any physician seeking to practice in Day County. This right is represented to physicians recruited to the community as being a valuable and financially significant right to which each is entitled. Occupancy of the Clinic has a special status in the community among patients and prospective patients by identifying a physician to be in good standing in the Webster medical community. All physicians who have practiced medicine in Webster since the ownership of the Clinic by Day County have been entitled to practice in the Clinic, and occupancy in the Clinic is a significant financial aspect of a physician's medical practice in Webster because county ownership and maintenance of the Clinic and related medical equipment permits a physician practicing in the Clinic to do so at significantly less expense than would be required to privately establish and maintain a separate medical clinic in Webster.

8. By virtue of representations made to the plaintiff by the Commission and their predecessors and authorized representatives, an implied contract exists in favor of plaintiff to occupy the Clinic so long as he chooses to practice medicine in Webster, conditioned only upon plaintiff's maintaining his professional status in good standing and upon the fact that legal cause does not exist for plaintiff's eviction. At no time material hereto has plaintiff failed to maintain his professional status in good standing or has legal cause existed for his dismissal from the premises.

9. A physician in good standing on the medical staff of the Day County Hospital is likewise entitled to occupancy in the Clinic, as the two are one in contemplation of South Dakota law. Plaintiff remains a member of the medical staff of the Day County Hospital in good standing and plaintiff is therefore entitled to continued occupancy of the Clinic.

10. On or about September 19, 1982, at a special meeting, the defendant Commission, acting both individually and as members of the Commission, voted among other things to terminate plaintiff's right to occupy the Clinic "because of continued internal problems on the medical staff." This action was taken without prior notice or right to hearing to plaintiff. In so doing, the defendant Commission, individually and as members of the Commission, denied plaintiff his right to procedural and substantive due process of law secured to him under the Fourteenth Amendment to the United States Constitution. Further, at no time did the said defendants offer to plaintiff a meaningful hearing within a meaningful time.

11. In voting to terminate plaintiff's right to occupy the Clinic as alleged, and in acting in furtherance thereto, the defendant Commission, both individually and as members of the Commission, acted arbitrarily, capriciously, without just or adequate reason, willfully, maliciously and in bad faith, which actions were intended to destroy plaintiff's good name, reputation, honor, integrity, professional standing and goodwill. These actions were further intended to force plaintiff to remove his medical practice from Day County. Defendants' actions as alleged, and in furtherance thereto, have damaged plaintiff's professional reputation and goodwill to the extent that his medical prac-

tice in the community is diminished and to the further extent that his ability to take advantage of other employment opportunities has been seriously damaged.

12. More than two months after the Commission wrongfully voted to dispossess plaintiff from the Clinic, plaintiff was presented with a letter allegedly setting forth the reasons for the Commission's action. The reasons set forth therein, including that plaintiff allegedly was the cause of constant turmoil in the Clinic preventing the recruitment of additional physicians to the community, are not in fact the true reasons for the wrongful action of the Commission in voting to dispossess plaintiff from the Clinic. The true reasons for the wrongful act of the Commission were personal groundless animosity harbored by all defendants against the plaintiff and the desire of the defendants to enter into an unlawful combination and conspiracy among themselves in restraint of trade and commerce among the states to exclude plaintiff from the Clinic and to force plaintiff to remove his medical practice from Day County, in violation of plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution.

13. There exist by-laws of the Day County Hospital which are equally binding upon Day County and the members of the medical staff. The defendants flagrantly disregarded the procedural safeguards set forth in the medical staff by-laws in voting to dispossess plaintiff from the Clinc, thus denying plaintiff his right to procedural and substantive due process of law secured to him under the Fourteenth Amendment to the United States Constitution.

14. As a result of the actions of the Commission, both individually and as members of the Commission, in

terminating plaintiff's right to occupy the Clinic, and as a further result of their actions in furtherance thereof, plaintiff has suffered, and will continue to suffer, emotional and mental distress, embarrassment and humiliation.

15. In seeking to dispossess plaintiff from the Clinic, as elsewhere alleged herein, the Commission, both individually and as members of the Commission, acted contrary to the anti-discrimination provisions of the laws of South Dakota (SDCL 34-8-8.1) affecting county hospitals and clinics in violation of plaintiff's due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

16. By reason of the deprivation of plaintiff's due process rights secured to him under the Fourteenth Amendment of the United States Constitution, plaintiff is entitled to special damages in a sum to be hereafter alleged and to general damages in the sum of $500,000.00. Further, by reason of the willful, malicious and bad faith acts of the individual members of the Commission, plaintiff is entitled to punitive damages in the sum of $500,000.00.

COUNT TWO

(Deprivation of Equal Protection)

1. Plaintiff realleges the allegations of paragraphs 1 through 15 of Count One of the Complaint as if set forth here at length.

2. In voting to terminate plaintiff's right to occupy the Clinic the Commission, both individually and as mem-

bers of the Commission, failed to treat plaintiff in equal standing with other physicians practicing medicine in the community in violation of plaintiff's equal protection rights under the Fourteenth Amendment to the United States Constitution. In so acting, the said defendants have acted unreasonably and in a discriminatory manner contrary to plaintiff's equal protection rights under the Fourteenth Amendment to the United States Constitution.

3. By reason of the deprivation of plaintiff's equal protection rights he has been specially damaged in a sum to be hereafter alleged and generally damaged in the sum of $500,000.00. Further, because of the willful, malicious and bad faith actions of the individual Commission members, plaintiff is entitled to punitive damages in the sum of $500,000.00.

COUNT THREE

(Conspiracy to Deprive Civil Rights)

1. Plaintiff realleges the allegations of paragraphs 1 through 15 of Count One of the Complaint and the allegations of paragraph 2 of Count Two of the complaint as if set forth here at length.

2. Other individual residents of Day County, both prior and subsequent to September 19, 1982, both personally and through representatives and agents, communicated and conspired with the defendants to secure the unlawful removal of plaintiff from the Clinic. As such, the defendants, and each of them, entered into an unlawful combination and conspiracy, willfully, maliciously and in bad faith to deprive plaintiff of his rights, privileges and immuni-

ties secured to him by the Fourteenth Amendment to the Constitution of the United States.

3. By reason of the conspiracy of the defendants to deprive plaintiff of his civil and constitutional rights, plaintiff has been specially damaged in a sum to be hereafter alleged and generally damaged in the sum of $500,000.00. Further, by virtue of the willful, malicious and bad faith actions of all defendants personally, plaintiff is entitled to punitive damages in the sum of $500,000.00.

COUNT FOUR

(Anti-Trust)

1. Plaintiff realleges the allegations of paragraphs 1 through 15 of Count One of the Complaint and of paragraph 2 of Count Two of the Complaint as if here set forth at length.

2. Defendants, and each of them, together with other individual residents of Day County, have entered into an unlawful combination and conspiracy among themselves in restraint of trade and commerce among the states to exclude plaintiff from the Clinic (and all benefits accruing to plaintiff by reason of its occupancy as heretofore alleged), to diminish the scope and worth of plaintiff's medical practice, to unlawfully and unfairly restrain plaintiff's ability to compete equally with other physicians in Day County, and to force plaintiff to remove his medical practice from Day County.

3. Defendants' actions with respect to plaintiff's antitrust rights have a substantial effect on interstate commerce, and are not merely local, because a substantial portion of plaintiff's existing and potential patients receive

medicare benefits, plaintiff's access to which patients defendants seek to impair or destroy. Further, Day County has received and does receive Hill-Burton funds. Further, Day County purchases for both the hospital and the Clinic many thousands of dollars worth of services and equipment through interstate channels, much of which would be used by plaintiff or by plaintiff's patients.

4. By reason of the combination and conspiracy by all defendants in restraint of trade or commerce among the several states, plaintiff is entitled to special damages in a sum to be hereafter alleged and to general damages in the sum of $500,000.00. By reason of 15 U. S. C. 15, plaintiff is entitled to treble damages.

COUNT FIVE

(EQUITABLE RELIEF)

1. Plaintiff realleges the allegations of paragraphs 1 through 15 of Count One of the Complaint and paragraph 2 of Count Two of the Complaint as if here set forth at length.

2. Plaintiff is without a plain, adequate and speedy remedy at law.

3. The Commission has commenced in Day County Circuit Court, State of South Dakota, an action seeking to dispossess plaintiff from occupancy of the clinic. That such action is in furtherance of the wrongful, unlawful and unconstitutional acts of the defendants elsewhere in this complaint alleged, and the continued prosecution of said action, or any other act of the defendants to dispossess plaintiff, will cause plaintiff irreparable harm. Plaintiff will suffer irreparable harm by disrupting his medical

practice and unjustly and unlawfully causing him to establish a new and fully equipped medical clinic in Webster (no such other facility presently exists in Day County) at great and unnecessary expense to plaintiff. Further, plaintiff's professional reputation and goodwill will be further damaged unnecessarily and plaintiff's patients will be subjected to further uncertainty about plaintiff's status.

4. During the pendency of this action to maintain the status quo, and hereafter, the court should enjoin and restrain the defendants from further prosecuting the aforesaid state action, and further, from taking any other act calculated or designed to effect plaintiff's removal from the Clinic or to otherwise further deprive plaintiff of his constitutional rights.

WHEREFORE, plaintiff prays judgment against the defendants, as follows:

(1) Special damages in a sum to be later alleged and general damages in the sum of $500,000.00, and punitive damages in the sum of $500,000.00, for violation of plaintiff's due process rights;

(2) Special damages in a sum to be later alleged and general damages in the sum of $500,000.00 and punitive damages in the sum of $500,000.00 for the deprivation of plaintiff's equal protection rights under the Constitution;

(3) Special damages in a sum to be later alleged and general damages in the sum of $500,000.00 and punitive damages in the sum of $500,000.00 for the conspiracy of all defendants and others to deprive plaintiff of his due process and equal protection rights;

(4) Damages in the sum of $500,000.00, to be trebled, for defendants' combination and conspiracy in restraint of trade or commerce against plaintiffs;

(5) Equitable relief, enjoining and restraining defendants, and each of them, from prosecuting the state action to dispossess plaintiff from the Clinic, and further, to restrain and enjoin defendants, and each of them, from taking any other act to dispossess plaintiff from the Clinic or to otherwise violate plaintiff's constitutional rights;

(6) For reasonable attorney's fees under both the civil rights and anti-trust statutes of the United States;

(7) For plaintiff's costs and disbursements herein; and

(8) For such other and further relief as the court may deem appropriate.

Dated this 10 day of December, 1982.

MAY, ADAM, GERDES &
THOMPSON

By: /s/ David A. Gerdes
Attorneys for Plaintiff
503 S. Pierre Street
P. O. Box 160
Pierre, SD 57501
(605) 224-8803

and

RICHARDSON, GROSECLOSE,
KORNMANN, WYLY, WISE
& KLINKEL

By: /s/ Thomas E. Klinkel
Attorneys for Plaintiff
One North Main
P. O. Box 1030
Aberdeen, SD 57401
(605) 225-6311

State of South Dakota, County of Day, ss.

ELDON E. BELL, M. D., being first duly sworn, deposes and says that he is the plaintiff above captioned, that he has read the foregoing complaint and knows its contents, and that to his best knowledge, information and belief the same are true and correct.

/s/ Eldon E. Bell

Subscribed and sworn to before me this 10th day of December, 1982.

/s/ David A. Gerdes
Notary Public

(SEAL)

EXHIBIT 11

WEBSTER CHAMBER OF COMMERCE
Heart of the South Dakota Lake Region
WEBSTER, S. DAK. 57274
"Petunia Capital of the World"

May 8, 1969

TO WHOM IT MAY CONCERN:

The City of Webster, South Dakota, is in dire need of medical doctors. At present, Webster has two practicing physicians, one General Practitioner and one Board Surgeon. The community is prepared to guarantee a salary of $30,000.00 per year to any physician interested in settling in our community. The earnings are not limited to $30,000.00 providing a physician can produce income over and above this amount. In the year 1968, one of our physicians grossed $75,000.00 and the other $65,000.00. Therefore, it is evident the guaranteed salary of $30,000.00 will be far exceeded.

The County of Day, of which Webster is the county seat, owns and operates a new clinic and 40 bed hospital. The only obligation the doctor has is to pay to the County $50.00 per month office rent, and incidental expenses. Webster is also in a position to guarantee a new three bedroom home to any physician wanting such facilities. The obligation for these facilities would be a monthly rental or, if he would desire to do so, he could purchase the home.

Webster would also pay any moving expenses incurred by a doctor accepting the above offer. If any physician should be facing a military obligation, there is an opening in the South Dakota National Guard whereby his obligation could be completely satisfied. The doctor, after accepting a captain's commission in the South Dakota National Guard, would be assigned as the Battalion Surgeon at Battalion Headquarters, located in Webster, South Dakota.

If there is anyone interested in the above offer, for further details, please contact Leon J. Vander Linden, telephone 345-3161 (office) or 345-3465 (home). You may also contact Don Bowles, telephone 345-3301 (office) or 345-3264 (home) if you desire.

Sincerely yours,

Doctor Committee
Webster Chamber of Commerce
Webster, South Dakota

Located at Intersection of U. S. Highway 12 and
State Highways 25 and 23

EXHIBIT 7

OFFICIAL PROCEEDINGS
DAY COUNTY COMMISSIONERS

The Board of Day County Commissioners met in special session in their Chambers at the Day County Courthouse July 17, 1981. Meeting called to order with Chairman Hesla presiding. Present at roll call were Commissioner Grosek, Hein, Block and Sellevold.

The minutes of the July 13, 1981 meeting were read and approved:

HOSPITAL:

Steve Jackson, Hospital Administrator, Laverne Batie, Webster City Mayor and the following members of the Hospital Governing Board: Duane Koppmann, Chairman, David Prieb, Steve Sewell and Dale Hilgemann, met with the Board. The operation of the Day County Hospital was discussed.

Mr. Sellevold made a motion, seconded by Mr. Block to authorize the Chairman of the Hospital Governing Board, Duane Koppmann, to sign an agreement with American Medical Service Association Inc., (AMSA) to establish a medical practice in Day County. All members present voting aye. Motion carried.

Mr. Grosek made a motion, seconded by Mr. Hein to adopt the following resolution:

RESOLUTION:

WHEREAS, the Day County Board of Commissioner's having authorized the execution of a contract with

American Medical Service Association Inc., for establishing a medical practice in Day County.

AND WHEREAS, the county has recently built a new addition to the Day County Medical Center.

AND WHEREAS, it is now necessary to establish a current policy for the operation and maintenance of said Medical Center.

NOW THEREFORE BE IT RESOLVED, by the Day County Commissioners that any physician basing his practice at the Day County Medical Center, shall as of September 1, 1981, be required to be a member of the active medical staff of the Day County Hospital.

All members present voting aye. Resolution declared adopted.

Mr. Sellevold made a motion, seconded by Mr. Grosek, to adopt the following Resolution:

RESOLUTION:

BE IT RESOLVED, by the Day County Commissioners, that they wish to thank Dr. Lawrence Nelson and Dr. Eldon E. Bell for the extra effort they have put forth in the active support of the Day County Hospital, its nurses and staff during the past recent months, when they have been required to assume additional duties and responsibility at the Day County Hospital.

All members present voting aye. Resolution declared adopted.

The Board adjourned to meet July 20, 1981.

Angeline C. Gilbertson,
Auditor

OFFICIAL PROCEEDINGS
DAY COUNTY COMMISSIONERS

The Board of Day County Commissioners met in special session at 3:00 p.m. Sept. 19, 1982. Meeting called to order with Chairman Sellevold presiding, present at roll call were Commissioner Block, Abbott, Hein. Hesla absent.

Attorney Ed Evans, Sioux Falls, met with the board to provide legal counsel.

Mr. Hein made a motion to deliver letters to Eldon Earl Bell, M. D., Lawrence F. Nelson, M. D. and L. C. Vogelgesang, M. D., to give notice the Day County Commissioners will terminate their oral lease at the Day County Medical Center on October 20, 1982. This notice is given pursuant to SDCL 43-8-8 and 43-8-9. Motion was seconded by Mr. Block. All members present voting aye. Motion carried.

The Board adjourned to meet September 27, 1982.

Angeline C. Gilbertson,
Auditor

EXHIBIT 1

(Filed September 20, 1982)

Office of
DAY COUNTY AUDITOR
Webster, S. Dak. 57274

September 20, 1982

Eldon Earl Bell, M. D.
Day County Medical Center
22 West 12 Avenue
Webster, South Dakota 57274

Notice is hereby given that your oral lease of the Day County Medical Center is terminated, effective 30 days from the date hereof, October 20, 1982, and you are directed to quit, vacate and give up the premises on or before that date. This notice is given pursuant to SDCL 43-8-8 and 43-8-9.

Dated this 20 day of September 1982

Signed /s/ Chester Sellevold
Chairman board of Day County
Commissioners

Attest: /s/ Angeline C. Gilbertson
Day County Auditor

EXHIBIT 8

COUNTY TERMINATES LEASES AT LOCAL CLINIC

The Day County Commissioners, meeting in a special session Sunday afternoon, passed a motion to notify three of the four doctors practicing at Day County Medical Center that their oral lease at the facility is terminated, effective in 30 days.

The commissioners indicated they took Sunday's action because of continued internal problems on the medical staff.

Receiving the following notification Monday were Doctors Eldon Bell, Lawrence Nelson and Lloyd Vogelgesang. The delivered letters read in part:

"Notice is hereby given that your oral lease of the Day County Medical Center is terminated, effective 30 days from the date hereof, October 20, 1982, and you are directed to quit, vacate and give up the premises on or before that date. This notice is given pursuant to SDCL 43-8-8 and 43-8-9."

The three doctors, who have practiced here a number of years have an oral lease, which can be broken at any time with proper notice, according to officials. They indicated that Dr. Frank Sainburg, who recently began practicing here, has a signed contract for a nine month lease, which is good into 1983 and is not affected by Sunday's action.

The motion, after about an hour of discussion by four of five county commissioners and their attorney, Edward Evans of Sioux Falls present, was made by Commissioner Orville Hein. He, along with Ardis Abbott, Alvin Block and Chester Sellevold, all voted aye. Charles Hesla, fifth member of the board, was not present because he is out of town.

The commissioners indicated they met Sunday instead of the usual Monday because several members were to attend a state convention at Sioux Falls the first of this week.

EXHIBIT 2

Office Of
DAY COUNTY AUDITOR
Webster, S. Dak. 57274

November 23, 1982

Dr. Eldon E. Bell
Webster
South Dakota 57274

Dear Dr. Bell:

There has been a continuing dispute between the physicians in this community for over seven years. We have confronted this issue on a number of occasions but the problem continues unabated. Most recently, the dispute surfaced when Drs. Bell, Nelson and Sainburg filed a certificate of fictitious name statement with the Day County Register of Deeds stating they were going to practice under the name of "Day County Medical Center" and that their office would be called the "Professional Building". At this same time, they informed all medical clinic employees that they were going to separate their practice from Dr. Vogelgesang and that the employees would have to decide whether they wanted to work for Dr. Vogelgesang or Drs. Bell, Nelson and Sainburg. The employees were given three days to make their decision.

The above incident is not the reason for our decision but is only one in a continuing series of problems at the Day County Medical Center. Our investigation reveals that this continuing dispute has resulted in an atmosphere not conducive to attracting new physicians to our community. We believe that we will not be able to attract new physicians to our county as long as this conflict continues between our current physicians.

Our lack of physicians and the continuing turmoil has resulted in Dr. Vogelgesang resigning from the staff of the Day County Hospital and in not admitting patients to

that facility. If the dispute is not resolved in the near future, Dr. Vogelgesang will leave the community. While we do not condone Dr. Vogelgesang's actions in not admitting patients to Day County Hospital, we can understand his attitude [sic] in light of the problem at hand.

We want to attract new physicians to our community to practice in the clinic. To do so we need harmony and not discord among our physicians. We have tried to resolve the problem through cooperation in the past but this has failed. Attached is an agreement signed by Drs. Nelson, Bell, Vogelgesang and Unahalekhaka in which they all agree to resolve their conflicts and work together for the benefit of the Day County Hospital and the people of Day County. It is apparent that your efforts to cooperate have failed. Accordingly, some further action must be taken at this time to eliminate the continuing problem.

In our opinion, the turmoil will continue as long as you remain in the clinic. The turmoil has adversely affected not only the clinical staff but also the patients and community. Of course, this action does not prevent you from practicing medicine anywhere you desire, including Webster. Our only purpose is to eliminate you as a disruptive influence at the clinic.

We do not believe that dividing the clinic into two or more separate facilities is a viable solution. Our problem cannot be resolved by simply building walls between the physicians. Remodeling is not the answer. It would only result in the continuing dispute and turmoil. More critically, no new physicians would come to our community if this approach were adopted.

Rest assured that we are not favoring one individual over another. We are only trying to solve a long-standing dispute; one which the physicians have not been able to resolve among themselves during the past. We must take some action and eliminating you as the disruptive influence at the clinic is the best solution for all. This has been a difficult decision but hopefully you will understand that it is being made with the community's best interests in

mind. The easiest solution would be to take no action at all. By taking no action, we would solve nothing but we would also not be subject to lawsuits being filed against us as has been threatened by you.

Nevertheless, the magnitude and severity of this problem forces us to do what is right, regardless of the threatened consequence.

Sincerely,

CHAIRMAN—Chester Sellevold
DAY COUNTY BOARD OF COUNTY COMMISSIONERS